PUBLIC PROSECUTOR

v.

OOI CHUN SENG

HIGH COURT MALAYA, ALOR SETAR
KC VOHRAH J
[CRIMINAL TRIAL NO. 58-11-86]
29 DECEMBER 1990

CRIMINAL PROCEDURE: *Trafficking in dangerous drugs - Control and custody proved at end of prosecution case - Rebuttable presumptions invoked - Denial by accused - Existence of third party who was jointly charged but who was later discharged - No evidence that accused took packages from basket - View blocked - Reaction on arrest - Whether evidence of guilty mind - Presumptions rebutted - Dangerous Drug Act 1952, ss. 37(d) and (da)(ii).*

The accused O was charged with the trafficking of morphine under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act). O was seen carrying a crash helmet in which the plastic bags of drugs were found. The dispute is whether O (who was the pillion rider on the motorcycle) or X (the rider of the motorcycle) was the one who picked the plastic bag from the basket in front of X's knees, how O carried the helmet and how O reacted on being arrested. X was charged together with O but was later discharged on bond; efforts to locate him have failed. The Court held that the prosecution had satisfied the presumptions under s. 37(d) and (da) of the Act; O then made his defence to rebut these presumptions and said that X had told O that the packet contained fruits and cakes for the temple and that X had asked O to carry the said bag into the temple while X would park the motorcycle; O's contention was that X had taken the bag from the basket and given it to O. All the three police officers in this case say that they saw O take the package from the basket. O also said he had a lit cigarette in his left hand - this evidence was not contradicted or challenged.

Held:

[1] (a) The evidence of PW2, PW3 and PW5 showed up discrepancies as regards whether the accused was actually seen to take the package from the basket of the motor cycle, whether he kept his helmet under his right armpit and whether he tried to run away when he was about to be arrested.

[2] (a) At a demonstration of the relative positions of the motorcycle, O and X, it is clear that it was not possible for PW2 (who said he was sitting on a culvert) to have seen O take the package from the basket - his view of the basket was for the most part blocked by X sitting on the motorcycle.

(b) Similarly, it is doubtful that PW5 could have seen O take the package from the basket as the knee guard of the motorcycle must have obstructed his view.

(c) PW2 could not say if the accused was smoking that night; if O had a cigarette in his left hand and helmet in his right it seems natural for the bundle to have been put into the helmet.

[3] As to whether O's conduct amounted to absconding and the effects of mere absconding, not much importance can be attached to the act of absconding and it is not necessarily the result of a guilty mind.

[4] There is reasonable doubt created on the prosecution's case that various aspects of O's conduct indicated that he knew that what he was carrying was morphine.

[5] The Court feels disquiet as to X's role in the whole affair.

[6] Except for O's custody of the bag of drugs, there is no evidence which incriminates O.

[Presumption under s. 37(d) and (da)(ii) rebutted; accused acquitted and discharged.]

Case referred to:
Matru @ Girish Chandra v. The State of UP [1971] AIR SC 1051

Legislations referred to:
Criminal Procedure Code, s. 49
Dangerous Drugs Act 1952, ss. 39B(1)(a), B(2), 2, 37(d), (da)

For the public prosecutor - Tun Abdul Majid bin Tun Hamzah
For the accused - Kumaraendran; M/s. Kumar, Sitham & Co.

JUDGMENT

KC Vohrah J:

The accused is charged with trafficking in 1814.5 grammes of morphine on 10 October 1985 at about 9.20 a.m. near a Chinese temple at Padang Sera, Kodiang, Kubang Pasu in Kedah, on offence under s. 39B(1)(a) and punishable under s. 39B(2) of the Dangerous Drugs Act 1952 (the Act).

There is no dispute that on 10 October 1985 at about 9.20 p.m at the place specified in the charge the accused was seen carrying a crash helmet and that when he was arrested it was found that the crash helmet held a plastic bag in which were 6 rectangular lumps of a substance which on analysis by a Government Chemist was shown to be 1814.5 grammes of morphine.

Inspector Jamaludin (PW2) and DPC Chong (PW3) had arrived earlier at the scene at 9 p.m and were together with Detective Corporal Hamzah & DPC Hanafiah (PW5).

Inspector Jamaludin and DPC Chong were sitting on top of a culvert on the right side of the Jitra - Kodiang road as one faces Kodiang. They were facing the road. Nearby, to their left, was a Chinese temple on the same side of the road. In the compound of this temple a Chinese opera was in progress and cars were parked bumper to bumper on both sides of the road.

On the other side of the road were the two other police personnel, DPC Hanafiah (PW5) and Detective Corporal Hamzah.

At about 9.20 p.m PW2, PW3 and PW5 saw a motor cycle KA 7316 coming from the direction of Jitra. As it neared the area where they were, the motor cycle slowed down. All 3 saw the pillion rider of the motor cycle get down on the left side of the motor cycle. This man was the accused. The rider of the motor cycle, one Ooi Lai Bee, continued to sit on the motor cycle.

It is not disputed that the pillion rider took off his crash helmet and that later he crossed the road in the direction of the temple and, as stated earlier, it is not disputed that when he was arrested he was found with the helmet containing a plastic bag in which were found 6 lumps of morphine. What is disputed is the sequence of events as regards whether the accused or Ooi Lai Bee was the one who picked the plastic bag from the basket which was fixed to the

knee guard in front of Ooi Lai Bee's knees before the accused was found with it, how the accused carried the helmet containing the plastic bag and how the accused reacted as he was being arrested.

Inspector Jamaludin, under examination-in-chief, stated that as soon as the motor cycle came to a stop its engine was cut off; he then saw the accused move one step forward and take a package out from the basket which was in front of the rider who was still on the motor cycle. The accused then put the package into his helmet and placed the helmet under his right armpit after which he crossed the road and came towards him. When the accused was about 5 feet from him, Inspector Jamaluddin said, he got up and shouted, "Polis! Jangan lari!". Simultaneously DPC Chong seized the accused in an embrace. The helmet dropped. The accused was then handcuffed. After that the rider of the motor cycle Ooi Lai Bee and the motor cycle were brought over by PW5 and Corporal Hamsah to where he, Inspector Jamaluddin, was. Inspector Jamaluddin stated that he took out a plastic bag from the helmet and found that it contained 3 packages, each package having 2 lumps of a white substance.

DPC Chong (PW3) said that he did not see what the accused did at the motor cycle as his view was blocked by the rider of the motor cycle. He, however, saw the accused cross the road with a helmet and about 6 feet before the accused reached him he heard Inspector Jamaluddin say, "Polis! Jangan lari!" and he straightaway pounced upon and embraced the accused from the back. The accused twisted his body and tried to run. The helmet fell. He said the accused looked pale and he also added the accused trembled at the time of his arrest.

PW5, DPC Hanafiah, who was on the same side of the road where the motor cycle came to a stop said under examination-in-chief that he saw the accused take a package from the basket attached to the motor cycle and put it in his helmet. The accused then held the helmet under his right armpit and crossed the road where he was arrested.

Under cross-examination all 3 witnesses PW2, PW3 and PW5 gave evidence which showed up discrepancies as regards whether the accused was actually seen to take the package from the basket of the motor cycle, whether he kept his helmet under his right armpit and whether he tried to run away when he was about to be arrested.

Whatever discrepancies there were, and this will be examined when I consider the defence, these discrepancies did not detract from the unchallenged prosecution evidence that the accused was found with the helmet containing a bag holding 6 lumps of a white substance. These 6 lumps or blocks of the white substance were analysed by the chemist and found, and I have no reason to doubt his finding, to be morphine, a "dangerous drug" within the meaning of s. 2 of the Dangerous Drugs Act 1952. The total weight of morphine was 1814.5 grammes.

Before I proceed to deal with the matter whether a *prima facie* case has been made out I would like to note that the investigating officer gave evidence that the rider of the motor cycle, Ooi Lai Bee, was charged with the accused in respect of this offence and that on 5 April 1986 he was discharged. The Court record shows that he was charged that he in joint concert with the accused trafficked in the morphine that is the subject matter of this trial. He was released on bond under s. 49 of the Criminal Procedure Code but could not be traced for this trial.

At the close of the case for the prosecution the primary facts showed that the accused was in control and custody of the bag containing morphine and invoking s. 37(d) of the Act the accused is deemed to be in possession of the morphine and presumed to have known its nature. Since the morphine weighed 1814.5 grammes and under s. 37(da) he is presumed to have trafficked in the morphine. The presumptions are rebuttable and I called upon the accused to make his defence on the charge.

The accused elected to give evidence on oath and he denied knowing that what he carried that night in his helmet was morphine. He said that he had been handed and was requested by his cousin, Ooi Lai Bee, the rider of the motor cycle, to bring "cakes and fruits" for prayer at the temple; his cousin told him that he intended to park his motor cycle and look for a friend in the temple compound. The accused said that he took the package from Lai Bee after Lai Bee had picked it up from the basket in front of him. The accused but the packet in his helmet, then carried the helmet in his right hand - he had a lighted cigarette in his other hand - this piece of evidence was not contradicted or challenged - and crossed the road. He saw what looked like light from a motor cycle coming from the left - he turned to look at it and he was violently seized whereupon he struggled. He said he did not hear anyone say "Polis!, Jangan lari".

The accused recounted his activities prior to his arrival at the scene. His first cousin, Ooi Lai Bee, had invited him to go to the temple at Padang Sera that night at 8.45 p.m. Ooi Lai Bee lived most of the time in the accused's family house at Kodiang and he used to make use of motor cycle KA 7316 belonging to the accused's father. It was "the birthday of the god of the temple" and there was an opera show there and Ooi Lai Bee invited him to watch the opera show.

The accused stated that when he came out of the house he saw Ooi Lai Bee seated on his father's motor cycle with the engine already switched on. The accused sat as pillion rider and Ah Bee left the house in Kodiang towards the direction of Jitra. They passed the Chinese temple but Ooi Lai Bee did not stop there. Instead he slowed down and looked around. The accused said that he asked Lai Bee why he did not stop there and Lai Bee replied that he was looking for a friend. Ooi Lai Bee proceeded for 3 miles in the direction of Jitra and then turned back and travelled towards Kodiang. As Lai Bee approached the temple he slowed down and after passing the temple he stopped the motor cycle on the left side of the road (as one faces Kodiang), 25 feet away from a culvert where he saw 2 persons sitting down.

The accused said that when Lai Bee stopped his motor cycle Lai Bee looked around as if searching for someone. The accused stated that he got down and took out his helmet and lit a cigarette. Ah Bee then requested him to carry a packet of fruits and cakes for prayer; he requested him to bring the things into the temple while he went to park his motor cycle and look for a friend in the temple after which he would follow behind me.

He said that he was beside Lai Bee and that Lai Bee, while still sitting on the motor cycle, took out a package from the basket, using both his hands to lift it. Lai Bee, however, quickly put his right hand on the handle of the motor cycle to accelerate the throttle as the engine appeared as if it was going to stop; and the accused then took over the package. The accused denied that he had himself lifted and taken the package from the basket.

Apart from relying on the presumption of knowledge under s. 37(d) of the Act the prosecution had tried to show that the accused had knowledge of the morphine because:

1. he had himself taken the package of morphine from the basket attached to the knee guard of the motor cycle;

2. he had tried to conceal the package while crossing the road and the package could not have contained cakes and fruits as claimed by him;

3. he had struggled and tried to escape when he was being arrested and that he had trembled while being arrested.

As earlier mentioned, Inspector Jamaluddin in his examination-in-chief, had stated that he saw the accused take the package from the basket; when he saw the accused come across and when the accused was about 5 feet away, he got up from the top of the culvert. If indeed he was sitting on top of the culvert and cars were parked bumper to bumper also on his side of the road how then could he have seen the accused take the package from the basket? It has to be noted here that under cross-examination Inspector Jamaluddin agreed that he was sitting on top of the culvert when the accused walked towards him. It has to be pointed out that under re-examination, he, however, stated that when the motor cycle arrived at the scene he got up from the culvert and that he went behind a motor car and looked at the motor cycle. Why did he not say so at the first opportunity? In any event at a demonstration of the relative positions of the motor cycle *vis-a-vis* Ooi Lai Bee sitting on the motor cycle, the accused standing to the left of the motor cycle (he himself looking towards the motor cycle) - the approximate relative positions obtaining on the day of the incident - I found that it was not possible for Inspector Jamaluddin to have seen the accused take the package from the basket which was in front of the knees of Ooi Lai Bee even if he had stood up and viewed the scene. It was clearly demonstrated that his view of the basket was for the most part blocked by Ooi Lai Bee sitting on the motor cycle.

DPC Hanafiah who was on the other side of the road and nearer to the motor cycle said he saw the accused take out a package from the carrier of the motor cycle but from what he demonstrated in Court as regards his position *vis-a-vis* the motor cycle, the accused and the rider of the motor cycle, I am doubtful that he could have seen the accused take a package from the basket as the knee guard of the motor cycle must have obstructed his view. He may have seen the package being taken out from the general area of the basket by the accused, above the knee guard area. It could well have been handed to the accused by Ooi Lai Bee as claimed.

I cannot find as a fact that the accused himself took the package containing heroin from the basket of the motor cycle.

As to whether the accused was concealing the bundle of morphine in the helmet by putting it in his helmet, the evidence of the accused was that he had a lighted cigarette in his left hand and he carried the package in his helmet. Inspector Jamaluddin could not say if the accused was smoking that night. If he had a cigarette in his left hand and helmet in his right it seems natural for the bundle to have been put into the helmet.

DPC Hanafiah said he saw the accused put the helmet under the armpit but he agreed that when the accused put the things in the helmet he carried the helmet up to the level of the waist and that he did not know what happened later. He agreed that he did not know how the accused carried it across the road. DPC Chong did not describe how the helmet was carried but Inspector Jamaluddin said he saw it carried under the right armpit of the accused but he agreed that in his police report he had stated that the accused carried it in his hand ("pegang") not that he carried it pressed against the body ("mengepit"). To my mind there is reasonable doubt as to whether the accused carried the helmet by pressing the helmet against his body under the right armpit.

In Court it was difficult to put the bundle of 6 blocks of morphine weighing 1.84 kilogrammes into the helmet let alone make the bundle fit exactly into the confines of the cavity of the helmet and the hard edges of the morphine lumps stuck out.

I, however, do not feel confident that I can make adverse inferences from this in relation to the story of the accused that he was told that it was a bundle of cakes and fruits and that he put the bundle into the helmet without thinking. The point is that I do not know how the lumps or blocks of morphine were packed in the bundle that night - whether they were wrapped so compactly that the bundle did readily fit into the helmet. Then, too, I cannot infer, in the absence of evidence, that the blocks of morphine, when seized 5 years ago, were as hard as they were found in Court or they were soft and malleable and could be mistaken for cakes.

His story was that after he had been handed the package of what he thought contained cakes and fruits for prayer he put the package into the helmet. It was the evidence of the prosecution that he indeed put the package into the helmet. There was no prosecution evidence that he had difficulty in putting the package into the helmet It could be there as was no opportunity to feel the contents of the package (which package he said he carried by a loop in the plastic bag). He said he was in a hurry to see the opera show and it was done suddenly and he could not remember whether it was heavy as he could not tell the weight. So could his story that he had no reason to suppose or suspect that he was carrying drugs be probable.

There was evidence by Inspector Jamaluddin that he identified himself as the police - he said he did not shout out the identification and simultaneously DPC Chong grabbed at the accused and that the accused put up a struggle when he was arrested and that he tried to escape. DPC Chong said as Inspector Jamaluddin identified himself, he pounced on the accused and the accused turned his body and tried to escape. The accused's explanation was that while he was crossing the road he saw light coming from the direction of Kodiang from a motor cycle and he turned to look at the light and someone grabbed him violently about 6 feet from the edge of the road. He said he did not hear the sound of engine or hear the inspector identify himself as the police. Inspector Jamaluddin did say that it was noisy with the Chinese opera. The accused said he was frightened, he thought someone was going to rob him and two persons grabbed him; they pulled his hands behind him and handcuffed him. As he was being handcuffed he moved his body because his hands were pulled behind and he could not balance himself. He admitted he was frightened but he denied that he shivered.

It will be noted that DPC Chong did state that before he effected arrest of the accused he did not know if traffic was coming from Kodiang. Could then the story of the accused that he turned to look at approaching light of what looked like a motor cycle from Kodiang be true? That his turning of the body was considered by DPC Chong as his twisting his body and attempting to escape? In any event the accused said that he thought it was a robbery and he felt frightened. Though he denied he trembled - Inspector Jamaluddin did not mention it but DPC Chong said the accused trembled - could DPC Chong have been mistaken? I cannot discount that he may have lost balance while being handcuffed behind his back and that gave the appearance of his struggling with the police. Even assuming that he put up a struggle and that he attempted to escape, and I have nagging doubts about that, I do not think such conduct, without more care lead to an irresistible conclusion that he had a guilty mind. I have in mind a passage from the Judgment of the Indian Supreme Court in case of *Matru @ Girish Chandra v. The State of UP* [1971] AIR SC 1051 which bears reproduction:

> The appellant's conduct in absconding was also relied upon. Now mere absconding by itself does not necessarily lead to a firm conclusion of guilty mind. Even an innocent man may feel panicky and try to evade arrest when wrongly suspected of a grave crime: such is the instinct of self-preservation. The act of absconding is no doubt relevant piece of evidence to be considered along with other evidence but its value would always depend on the circumstances of each case. Normally the Courts are disinclined to attach much importance to the act of absconding, treating it as a very small item in the evidence for sustaining conviction. It can scarcely be held as a determining link in completing the chain of circumstantial evidence which must admit of no other reasonable hypothesis than that of the guilt of the accused.

In my view there is reasonable doubt created on the prosecution's case that various aspects of his conduct indicated that he knew that what he was carrying was morphine.

I now come to the matter of whether the presumptions of knowledge of the morphine and of trafficking have been rebutted. To my mind no consideration of these matters can be made without looking into account that the bag of drugs was brought to the scene on the motor cycle. Who brought it there? Whoever brought it there had the knowledge that it contained drugs. The disquiet have in this regard is the role Ooi Lai Bee played in this case. Was he the villain in the case? The story of the accused would seem to show that. Was he? Ooi Lai Bee was the rider of the motor cycle. The bag of drugs was in the basket in front of him. Could he have handed the bag of drugs to the accused? It cannot be discounted. Did he request the accused to bring cakes and fruits to the temple? We do not know. We do know, however, from the Court records that on 22 October 1985 he was charged in the Magistrate's Court Jitra that he jointly with the accused trafficked in the drugs, the subject matter of the case and that both of them were remanded until 5 April 1986 when Ooi Lai Bee was released by the Magistrate at Jitra on a bond of RM10,000 in one surety to appear in Court. The evidence is that Ooi Lai Bee could not be traced for the trial of the accused. Why has he disappeared? Has he anything to hide?

There is no evidence which incriminates the accused except for his custody of the bag of drugs.

Ooi Lai Bee could have been the villain. He could have used the accused. To my mind on a balance of Probabilities the presumptions under s. 37(d) and s. 37(da) (ii) have been rebutted and I acquit and discharge the accused.

Also found at [1991] 1 CLJ 609